RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

LISA E. SORONEN
Executive Director
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street NW,
Suite 515
Washington, DC 20001
(202) 434-4845

RICHARD A. SIMPSON
Counsel of Record
TARA L. WARD
EMILY S. HART
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
rsimpson@wileyrein.com

Counsel for Amici Curiae

275399

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INTEREST OF *AMICI CURIAE*[1]

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the fifty States, three Territories, and two Commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been docketed.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

State and local governments have broad responsibilities for regulating private conduct within their respective jurisdictions. That responsibility includes repealing and modifying laws over time as additional information becomes known and as the views of citizens evolve and change. State and local officials are responsible to the citizens who elected them for the decisions they make regarding how to regulate private conduct.

The decision below permits Congress, in effect, to freeze state and local laws and regulations in place, in areas of law in which Congress has not preempted the field by enacting its own rules. By doing so, Congress creates the false and misleading impression that state and local officials are responsible and should be held accountable for policy choices over which those officials have no real

control. Accordingly, this Court's decision will have a substantial impact on the rights and responsibilities of state and local governments to regulate conduct within their jurisdictions.

SUMMARY OF ARGUMENT

As construed by the Third Circuit, the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701, violates the Tenth Amendment. According to the Third Circuit, PASPA prevents states not only from legislating to affirmatively "authorize" sports wagering, but also from modifying or repealing existing state restrictions on sports wagering.

In reaching this result, the Third Circuit attempted, but failed, in two rounds of decisions, to delineate in a manner consistent with the Tenth Amendment exactly what states can and cannot do to regulate sports wagering under PASPA. *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey ("Christie I")*, 730 F.3d 208 (3d Cir. 2013); *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey ("Christie II")*, 832 F.3d 389 (3d Cir. 2016). In *Christie I*, the panel decision reasoned that PASPA would allow repeal of existing bans on sports wagering. In *Christie II*, however, the *en banc* Third Circuit reversed course, holding that, while full repeal of sports wagering bans might be permissible under the statute, the partial repeal enacted by New Jersey is not.

The Third Circuit's opinion leaves states with only two options: maintain and freeze in place bans they had in place when PASPA was enacted a quarter century ago in 1992, or completely repeal existing bans, allowing

unfettered and totally unregulated sports wagering. That is no choice at all, as permitting totally unregulated sports wagering is not a viable (or responsible) alternative.

Moreover, the Third Circuit's suggestion that there *might* be a third option because some "de minimis" partial repeals of existing bans *might* pass muster cannot be squared with the rationale of its ruling that New Jersey's partial repeal at issue here violates PASPA. In any event, this third option, if it exists at all, is so narrow that it applies only to trivial changes, such as permitting social betting among friends and family. It does not give states any meaningful opportunity to shape the substance of state law in accordance with the considered judgment of state officials regarding the competing concerns presented.

Thus, in the real world, PASPA gives states only one option: freeze state law as it existed in 1992, with no meaningful ability to modify it by repeal or otherwise. By doing so, Congress has impermissibly commandeered state law. Congress cannot, on the one hand, fail to preempt the field by way of enacting a federal regime for the regulation of sports wagering and, on the other hand, prevent states from taking any meaningful action to revise their laws to reflect constituent opinion. To allow as much would be to thwart fundamental principles of democracy under which legislators are held accountable for the policy choices they actually make—not for outdated or ineffective policies they are prohibited by Congress from changing.

The practical implications of the decision below extend well beyond sports wagering, an important topic of considerable concern to state and local governments

by itself. The rationale of the Third Circuit's decision upholding its reading of PASPA would permit Congress to order state and local governments to freeze state and local law not just on sports wagering, but also on other issues of critical importance to state and local governments and their constituents, notwithstanding the absence of any comprehensive federal regulation on the topic. Examples include medical use of narcotics, physician-assisted death for the terminally ill, drug misuse and substance abuse during pregnancy, and self-driving cars. Accordingly, the court of appeals' decision should be reversed.

ARGUMENT

I. This Court should hold that PASPA, as read by the Third Circuit, violates the Tenth Amendment because it prevents New Jersey from modifying or repealing existing state restrictions on sports wagering in the absence of any federal regime for the regulation of sports wagering.

A. The Third Circuit's reading of PASPA effectively requires states to freeze prohibitions on sports wagering they had in place in 1992. Full repeal of all regulations is not a viable alternative, and the Third Circuit's decision gives states the ability (at most) to make trivial and essentially meaningless changes by way of a partial repeal.

Congress is empowered to prohibit sports wagering and thereby to preempt contrary state law, but it has declined to do so. In that regard, PASPA does not prohibit sports wagering outright, nor does it install any sort of

overarching federal regime for restricting or regulating sports gambling activities. Instead, PASPA dictates what states can and cannot do with their own state law.

As interpreted by the Third Circuit, PASPA gives states two choices: (i) maintain and freeze in place existing bans dating back to 1992; or (ii) completely repeal existing bans, allowing unfettered and totally unregulated sports wagering. In effect, only the first option is viable, as a total repeal of all regulation would be so irresponsible and politically impossible as not to be a real-world option. In short, Congress has impermissibly commandeered states' ability to govern effectively in this space by dictating the content of state law.[2]

The Third Circuit's construction in *Christie I* and *Christie II* of the types of state activity that are and are not allowable under PASPA exposes fundamental flaws in the law itself, as well as in the court's reasoning. PASPA provides, in relevant part, that "[i]t shall be unlawful for . . . a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" enumerated forms of sports wagering. *See* 28 U.S.C. § 3702(1). In *Christie I*, the Third Circuit held that PASPA would allow states to repeal in full all

2. Of course, Congress through its commerce power could pass a law banning sports wagering outright. *See Christie I*, 730 F.3d at 225 ("[T]here can be no serious dispute that the professional and amateur sporting events at the heart of the Leagues' operations 'substantially affect' interstate commerce."). But Congress has declined to do so. Instead, Congress has told the states that they cannot modify the bans on sports wagering they had in effect in 1992, regardless of whether a complete ban is still a wise policy choice in their judgment.

existing bans on sports wagering: "We do not see how having no law in place governing sports wagering is the same as authorizing it by law." *Christie I*, 730 F.3d at 232 (considering whether New Jersey's then-proposed legislation seeking affirmatively to license gambling on certain sporting events violated PASPA). *Christie II* stood by that holding, which is a plausible reading of the language of the statute. *See Christie II*, 832 F.3d at 396.

The panel and *en banc* decisions in *Christie I* and *Christie II* struggle to articulate what, if any, actions a state could take short of a full repeal of all regulation to change their laws as they stood in 1992. In *Christie I*, in reasoning that PASPA would not prohibit a full-scale repeal of all state regulation of sports wagering, the panel decision acknowledged a "meaningful distinction between repealing the ban on sports wagering and authorizing it by law." 730 F.3d at 232.

In *Christie II*, however, the *en banc* Third Circuit concluded that New Jersey's more recently enacted law—which partially repealed existing prohibitions against sports wagering—*would*, in fact, violate PASPA by impliedly authorizing sports wagering. According to the court of appeals, New Jersey's proposed partial repeal did not present "a situation where there are *no* laws governing sports gambling in New Jersey." *Christie II*, 832 F.3d at 396. Absent that law, "New Jersey's myriad laws prohibiting sports gambling" would apply. *Id.* The Third Circuit concluded that "the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited." *Id.*[3]

3. In *Christie I*, Judge Vanaskie anticipated the difficulty in drawing a bright line between legislation affirmatively authorizing

The *en banc* decision thus presents states with a binary choice that, in reality, is no choice at all: leave in place the current prohibitions on sports gambling or repeal all regulation of it. Complete repeal would mean that a state could not prohibit minors from gambling, could not impose any regulation at all to assure that those conducting the activity were competent and that their activities were done honestly, and could not limit the times or places where gambling can occur. States and citizens may disagree about whether sports betting should be permitted and, if so, to what extent, but the current range of reasonable debate does not include simply permitting unfettered sports wagering with no regulation at all. Thus, the states have no choice; they must leave the prohibitions they had in place in 1992 in place in perpetuity because the only other "choice" of complete repeal is not a real-world option.

To be sure, the *en banc* Third Circuit decision does attempt in dicta to identify a third option, suggesting that certain partial repeals of existing regulations *might* be possible under PASPA. It fails, however, to provide any coherent rationale or meaningful explanation of how PASPA could be read in that way.

The Third Circuit held that the partial repeal at issue in this case violates PASPA because it by implication "authorizes" sports wagering. Under that rationale,

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sports wagering and legislation impliedly authorizing such activities by repealing restrictions on gambling: "[R]ecognition of such a distinction is untenable, as affirmative commands to engage in certain conduct can be rephrased as a prohibition against not engaging in that conduct." 730 F.3d at 245 (Vanaskie, J., concurring in part and dissenting in part).

it would follow that *any* partial repeal would likewise "authorize" sports wagering because, by definition, it would remove an existing prohibition on the activity and permit that activity to be conducted, *i.e.*, "authorize" the previously forbidden activity. Logically, therefore, the Third Circuit's justification for invalidating New Jersey's partial repeal at issue here means that no partial repeal could pass muster.

There is also a logical inconsistency between the Third Circuit's at least implied view that a complete repeal of all regulation is permissible and its holding that a partial repeal, like that at issue in this case, is not. Specifically, if the kind of partial repeal of existing prohibitions on sports wagering at issue here by implication "authorizes" sports wagering, why doesn't a complete repeal do the same thing, in spades?

In any event, the kinds of limited repeals that the Third Circuit suggests *might* be permissible under PASPA would be so limited as to be trivial. The Third Circuit itself characterized the exceptions that might be permitted as "de minimis." *Christie II*, 832 F.3d at 402. The example it gives of a partial repeal that *might* pass muster is a repeal of the ban on social gambling among family and friends. Such limited exceptions, if they exist, would leave the states with no meaningful opportunity to regulate sports wagering. Authorizing sports wagering among family and friends has the same *de minimis* impact as a partial repeal of state alcohol laws to allow a member of a minor's immediate family to offer a 19-year-old a glass of wine at a private holiday function.

In sum, such limited exceptions, even if permissible, would leave states with no meaningful ability to regulate; states would be relegated to dealing with trivial and marginal issues. PASPA therefore provides a binary choice of either the status quo of prohibition, or complete repeal. No state currently permits totally unfettered and unregulated gambling of any kind, let alone of sports wagering, and one could not reasonably question that there is a national consensus against doing so.[4] Thus, states have no choice at all but to freeze their laws as they existed 25 years ago, with the possible (but unlikely) exception of making trivial adjustments of no real consequence at the margins.

At bottom, by precluding states from modifying their existing laws, with only undefined and narrow possible exceptions that are of no practical use to states, PASPA effectively freezes state law as it existed in 1992. States are thereby stuck with the policy decisions they made in 1992, with no ability to modify their regulations in response to changing times, changing views, changing technology, and changing political alignments. Put differently, state officials are left responsible and politically accountable

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4. In fact, PASPA itself reflects Congress's recognition that sports wagering, if permitted at all, must be regulated. First, Congress exempted from PASPA's prohibition on state authorization of sports wagering the existing, highly regulated betting permitted in Nevada, as well as existing regulated sports lottery arrangements in Montana, Delaware, and Oregon. *See* 28 U.S.C. § 3704(a)(1)-(2); *Christie I*, 730 F.3d at 216. Second, PASPA allowed New Jersey a one-year window during which it could license sports wagering in Atlantic City, but only "pursuant to a comprehensive system of State regulation." 28 U.S.C. § 3704(a)(3)(B); *Christie I*, 730 F.3d at 216.

for continuing the regulations in place a quarter century ago but with no ability to change those regulations with the benefit of experience or otherwise.

B. This Court's precedent demonstrates that PASPA impermissibly commandeers states' ability to regulate private conduct in a field squarely within their defined responsibilities that has not been preempted by federal law.

The Third Circuit's determination that PASPA may, consistent with the Tenth Amendment, prohibit states from repealing or modifying existing sports wagering laws contravenes this Court's anti-commandeering precedent. It also fails to appreciate the severe adverse effect of its ruling on states' critical ability to regulate private conduct within their respective jurisdictions. The Third Circuit erred in holding that this legislation does not commandeer states' ability to govern.

At the heart of this Court's jurisprudence on anti-commandeering issues is the principle that Congress cannot dictate to states how they must regulate private conduct within their jurisdictions. Congress has broad powers to regulate private conduct itself and to preempt a field,[5] but may not direct states as to how they must

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5. Congress may preempt state law in three circumstances. First, Congress may "enact[] a statute containing an express preemption provision." *Arizona v. United States*, 567 U.S. 387, 388 (2012). Second, "state laws are preempted when they conflict with federal law." *Id.* Third, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id.* Here, Congress has not exercised any of its preemption options to legislate sports wagering.

regulate private conduct not otherwise preempted. *See New York v. United States*, 505 U.S. 144, 162 (1992) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). The Third Circuit recognized as much in analyzing the difference between federal legislation that affirmatively requires states to enact a particular law or to regulate in a particular manner, and federal legislation that prevents states from acting. *See Christie II*, 832 F.3d at 399.

What the Third Circuit did not appropriately value, however, is that at the same time PASPA prevents states from taking affirmative action, it does not create any kind of federal regime (nor does one already exist) to regulate or to enforce a ban on sports wagering. This key fact distinguishes the cases relied on by the Third Circuit from the facts at issue here.

The legislation at issue in the cases cited by the Third Circuit as examples of permissible regulation in a pre-emptible field created affirmative, federal regulatory frameworks. *See Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 268-69 (1981) ("'The Surface Mining Act is a *comprehensive statute* designed to 'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'") (emphasis added); *F.E.R.C. v. Mississippi*, 456 U.S. 742, 766 (1982) ("We recognize, of course, that the choice put to the States—that of either abandoning regulation of the field altogether or considering the federal standards—may be a difficult one.").

Indeed, the very purpose of passing the federal legislation at issue in *Hodel* was the need to enforce important federal environmental standards related to surface mining and its impact on interstate commerce. *See Hodel*, 452 U.S. at 280 (noting that congressional committees "also explained that inadequacies in existing state laws and the need for uniform minimum nationwide standards made federal regulations imperative").

Notably, the statute at issue in *F.E.R.C. v. Mississippi* required states to consider certain standards, but did not direct states as to what decision to reach after giving those standards consideration. This Court's decision turned on that critical distinction between requiring a decision-maker to consider an option without dictating the outcome, and directing the decision-maker as to what decision it must make. *See F.E.R.C.*, 456 U.S. at 764 ("Titles I and III of PURPA require only *consideration* of federal standards. And if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals.") (emphasis in original). Furthermore, because the only requirement levied on states under PURPA was that they consider federal standards for electricity and gas utilities, states were free to exit the field and leave the hard work and expense of regulating to Congress. *Id.* at 764-66. In other words, states had a choice: regulate pursuant to federal standards or let Congress regulate.

PASPA, on the other hand, gives states no such power to make decisions; to the contrary, it effectively requires states to maintain state law as it existed in 1992 contrary to both law and policy. *See, e.g., Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187 (1999)

(federal policy is to "defer to, and even promote, differing gambling policies in different States").

C. As a practical matter, states must be allowed to regulate sports wagering within their borders unless Congress chooses to preempt the field by outlawing or regulating such gambling activities itself.

The court of appeals also did not appropriately evaluate the practical ramifications of allowing Congress to prevent states from enacting *and modifying or repealing* legislation when there is no existing federal legislative or regulatory regime. Preventing any and all types of state action in such circumstances would freeze state laws in time and rob the states of their ability to govern.

Here, for example, under the Third Circuit's logic, states have not been able to take any legislative action related to sports wagering for 25 years—*i.e.*, since PASPA's enactment in 1992. There have been undeniable and significant developments in the gambling marketplace since that time. Among other things, since 1992, Internet gambling, along with smart phones and related applications, have revolutionized gaming, making it a more accessible and dynamic market. *See, e.g.*, James Banks, *Online gambling and crime: a sure bet?*, *The ETHICOMP Journal*, 2012 (noting that online gambling has flourished since the advent of the first gambling software in 1994 and, more recently, encrypted communication mechanisms enabling online financial transactions), *available at* http://shura.shu.ac.uk/6903/.

And yet, according to the Third Circuit, states have absolutely no power to react and adapt to those changes—even in the barest sense of modifying or repealing existing laws that the states and their citizens believe are outdated and unwise.

States have an obvious and substantial interest in regulating gambling within their borders. As other *amici* have noted, illegal gambling opportunities and activities have only grown since PASPA's enactment—a reality that inures to the detriment to the states and their citizens.[6] *See Christie II*, 832 F.3d at 395-96. Gamblers who would embrace legal sports gambling turn to the black market, which costs states legitimate revenue and taxes they would otherwise be collecting, and may even contribute to the spread of other illegal activities. *See id.* at 395-96 (acknowledging that PASPA "has been criticized for encouraging the spread of illegal sports gambling"); *id.* at 392 (acknowledging testimony before the New Jersey Legislature advising that regulated gambling would generate much-needed revenues for the state); *see also* Jay S. Albanese, *Illegal Gambling & Organized Crime: An Analysis of Federal Convictions in 2014*, at 4–5 (2015), https://stopillegalgambling.org/aga-assets/uploads/2016/03/Albanese_Illegal_Gambling_OC_Report_2014_cases_FINAL.pdf (connecting illegal gambling operations to crimes such as money laundering, racketeering, human and drug trafficking, and extortion).[7]

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6. *See* Brief of the American Gaming Association as *Amicus Curiae* in Support of Petitioners, at 11-12 (filed Nov. 14, 2016).

7. The Third Circuit's apparent assumption that allowing states to do *anything* in the gambling space would increase black market gambling is unsubstantiated and highly debatable.

In a rapidly changing area like gambling and sports betting, where there are strong and divergent views for and against legalization, legislators must make difficult and controversial choices. Congress could certainly take up the torch, pass a law banning sports betting, and thus assume full responsibility not just for choosing the nature and scope of regulation, but also for managing constituent expectations, fielding feedback, and accepting political accountability for the decision. Barring such action by Congress, however, state legislators step in, govern, and then must deal with whatever fallout is created by unpopular policies. *See Printz v. United States*, 521 U.S. 898, 920 (1997) ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens.").

Under either scenario, one of the two governing bodies (federal or state government) takes control and is responsible for intended and unintended outcomes. *See id.* (touting the federalist system as one "establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it") (quoting *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

Christie I, 730 F.3d at 216-17 (citing Senate Report asserting that "legalization has a negligible impact on, and in some ways enhances, illegal markets"). There is certainly support for the argument that making sports betting available legally has a beneficial effect. *See, e.g.*, Brief of the American Gaming Association as *Amicus Curiae* in Support of Petitioners, at 19-21. Furthermore, in the absence of preemption by federal law, it is for the states to make the important policy decisions in this area based on their own assessments of the available evidence. But under PASPA states have not been given that chance.

Here, however, the Third Circuit has construed PASPA as a shadow order of government in which Congress appears to act, but acts only on the states—not directly on private citizens—by preventing states from enacting, repealing, or modifying state laws related to sports gambling. In so doing, Congress has created the illusion that the states are in charge of gambling policy even though, as a practical matter, states cannot do anything other than keep existing prohibitions in place (or take the irresponsible and politically untenable route of permitting sports wagering by children and with no regulation at all to protect against corruption and other dangers). That is not only an incorrect result; it is also unjust. *Cf. New York*, 505 U.S. at 185 (under federal legislation that offered states a "legitimate choice," states "retain[ed] the ability to set their legislative agendas; state government officials remain[ed] accountable to the local electorate").

In such circumstances, unhappy constituents will blame state officials for the retention of unpopular policies even though, in reality, it is the federal government that has made the policy choices and has attempted—albeit passively—to regulate. That is a perverse result because it undermines one of the basic tenets of democracy whereby government officials are responsible to the citizens they represent for their decisions and policy choices. *See id.* at 168-69 ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in

accordance with the views of the local electorate in matters not pre-empted by federal regulation.").

Because Congress has chosen not to preempt the field by regulating the conduct of private persons in this critical area, states should be free to exercise their own judgments about whether to permit sports gambling, and, if so, on what terms. And yet, by the Third Circuit's reasoning, the states—in particular, state legislators—have their hands tied with state law frozen in place as it existed 25 years ago. Congress cannot, on the one hand, elect *not* to make the decision itself that the dangers of sports wagering are sufficiently important as to justify prohibiting the activity, but at the same time require states—as a matter of state law—to prohibit the activity, regardless of what the states' own independent judgments might be as to the cost-benefit calculations regarding permitting sports wagering. Put differently, Congress must fish-or-cut-bait. If it wants to leave regulation of sports wagering to state law, then the states must be free to make meaningful decisions about how to regulate sports wagering. *See Printz*, 521 U.S. at 928 (advising against "reduc[ing] [the states] to puppets of a ventriloquist Congress") (internal quotations and citation omitted).

II. Upholding the constitutionality of the construction of PASPA adopted by the Third Circuit would allow Congress to freeze state and local law on other issues of critical importance to state and local governments and their constituents.

The Third Circuit's rationale for upholding the constitutionality of its construction of PASPA is not limited to sports wagering. To the contrary, there is no

limiting principle that would prevent that same rationale from permitting Congress to dictate the content of state and local law in any number of other important topics of public concern, without itself taking responsibility for preempting the field with direct federal regulation of private conduct.

One example is provided by the regulation of narcotics—*i.e.*, ensuring that certain drugs are available for medical use but are also kept off the streets. Indeed, this Court has acknowledged that states have an obvious interest in the regulation of narcotics, whether it is to ensure that dangerous drugs remain off the streets or that certain narcotics are available for medical use by state residents. *See, e.g.*, *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) ("It is, of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions."). "'We need to curb abuse,' says New Mexico Senator Craig Brandt (R). 'At the same time, we need to make sure we don't make it more difficult for those who need pain medication to receive it,' says the disabled veteran who lives with chronic pain." *See* Jane Hoback, *Legislators from both sides of aisle are working together to fight the widespread, deadly abuse of heroin and prescription painkillers*, National Conference of State Legislatures (Apr. 1, 2016), https://goo.gl/5o5jfH.

The federal government also has an interest in regulating narcotics; Congress can (and routinely does) pass legislation aimed at eliminating (or severely restricting) the market for controlled substances. For example, Congress recently passed the Comprehensive Addiction and Recovery Act (CARA), Pub. L. No. 114-198—a "comprehensive effort undertaken to address the

opioid epidemic, encompassing all six pillars necessary for such a coordinated response – prevention, treatment, recovery, law enforcement, criminal justice reform, and overdose reversal." Community Anti-Drug Coalitions of America, The Comprehensive Addiction and Recovery Act (CARA), Public Law 114-198 https://goo.gl/PcpXcC (characterizing the Act as the "first major federal addiction legislation in 40 years").

Imagine, however, if Congress adopted a law similar to PASPA precluding states from "authorizing" any medical use of narcotics not already authorized as of the date of enactment of the federal statute. In such circumstances, states might not want to repeal *all* laws restricting or banning medical use of narcotics. At the same time, states might conclude that repeal of some state bans makes sense. For example, if a state were to determine that important medical needs or other issues specific to that state trump countervailing considerations, it might exercise its judgment to permit narcotic use in those limited circumstances. Under the Third Circuit's approach, a law similar to PASPA directed to narcotics would tie the states' hands, even if Congress had not adopted any actual preemptive federal regime.

That is just one example; there are countless other areas of law in which there is no federal legislation and states have enacted widely divergent legislation to manage the issue. For example, state law varies considerably as to the legality of physician-assisted death for the terminally ill—a highly controversial topic that states have managed differently. Five states and the District of Columbia have legalized the practice through legislation; another state has legalized assistance when ordered by a court; 37 have

prohibited the practice by statute; and another three prohibit the practice by common law. *See* State-by-State Guide to Physician-Assisted Suicide, ProCon.org (Feb. 21, 2017), *available at* https://euthanasia.procon.org/view.resource.php?resourceID=000132.

If Congress were to enact legislation parallel to PASPA prohibiting states from authorizing physician-assisted death not already authorized as of the date of enactment, states' hands would again be tied. No matter how public opinion or medical technology might evolve and change, a state that prohibited any form of physician-assisted death when the federal statute was enacted would have no flexibility to adjust its laws (or would have only the untenable option of repealing all regulation on the topic).

Similarly, concern for the rise in drug misuse and substance abuse during pregnancy and the resulting increase in infants born with drug dependence has led to debate by lawmakers at both the state and federal level as to the best legislative approaches to address the problem. The options discussed include criminalization of drug misuse that results in harm to infants and funding for non-punitive treatment programs. *See* The American Congress on Obstetricians and Gynecologists (ACOG), Toolkit on State Legislation, Pregnant Women & Prescription Drug Abuse, Dependence and Addiction, https://goo.gl/LP4nr2; ACOG, Improving Treatment for Pregnant and Postpartum Women Act, https://goo.gl/4qahs4 (discussing best approaches, including federal legislation reauthorizing residential treatment programs for pregnant and postpartum women). The medical community's understanding of the effect of certain drugs, both prescription and illegal, on the fetus, is continually

developing. There are strong feelings and conflicting views as to whether and how government should regulate in this area.

Here again, Congress could preempt the field by adopting nationwide federal regulation. What it should not be permitted to do is to pass a statute similar to PASPA that dictates to state and local governments the content of state and local law on the subject. Such a statute would paralyze the ability to react to new information, with potentially devastating consequences to mothers and infants.

Absent comprehensive federal regulation preempting the field, state and local governments similarly must be given flexibility to deal with technological advancements presenting unforeseen challenges and legal issues. For example, as the availability and complexity of self-driving and driverless cars increases, states will necessarily need to revisit and adapt existing safety and licensing requirements to the changing technology. Yet, if the Third Circuit's interpretation of PASPA is upheld, there would be nothing to prevent Congress from effectively directing states to freeze in place laws written in the 1980s, 1990s, and even 2000s, when self-driving cars were nothing more than the stuff of science fiction fantasies.

In sum, there is no doubt that Congress maintains the ability to preempt state law in a variety of areas. Where Congress has declined to do so, however, it may not, consistent with the Tenth Amendment, dictate that state and local government maintain their current laws and regulations in effect as matters of state and local law, with no meaningful ability to adjust or modify those laws.

CONCLUSION

The Third Circuit's reading of PASPA offers states only one real-world option: to freeze in place whatever state laws were on the books in 1992, no matter how outdated and inappropriate a state may now consider those laws to be. Put differently, PASPA acts directly on the states by dictating to them what the content of state law as to sports wagering must be, notwithstanding that Congress has not preempted the field by way of federal regulation. So read, PASPA impermissibly commandeers states' ability to govern themselves. The practical implications of the decision below are far-reaching and profoundly negative. This Court should reverse the decision of the court of appeals.

Respectfully submitted,

LISA E. SORONEN
Executive Director
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street NW,
Suite 515
Washington, DC 20001
(202) 434-4845

RICHARD A. SIMPSON
Counsel of Record
TARA L. WARD
EMILY S. HART
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
rsimpson@wileyrein.com

Counsel for Amici Curiae